UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAE APPLIED TECHNOLOGIES, LLC	)	
	)	
and	)	Case No. 28-CA-165334
	)	28-CA-170331
SECURITY POLICE ASSOCIATION OF NEVADA.	)	
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PAE APPLIED TECHNOLOGIES, LLC'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINSTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

Respondent PAE Applied Technologies, LLC ("PAE" or "Respondent") submits the following Reply Brief in support of its Exceptions to Administrative Law Judge Amita Baman Tracy's (the "ALJ") Decision and recommended Order, dated December 5, 2016. The General Counsel's Answering Brief (the "Answering Brief") to Respondent's Exceptions ignores the credible evidence in the record before the ALJ while, on at least one major point, seeking an unjustified expansion of Board law. For the reasons explained herein, as well as in Respondent's Brief in support of its Exceptions, the Board should sustain Respondent's Exceptions and reverse the Administrative Law Judge's findings and conclusions of law.

I. There is No Factual or Legal Support for the ALJ's Decision to Expand the Rights Provided under *Weingarten* to Permit a Union's Outside Counsel to Serve as a Union Representative in an Investigatory Interview.

As both the General Counsel and the Union recognize, in the forty plus years since the U.S. Supreme Court's decision in *NLRB v. J. Weingarten*, 420 U.S. 251, 256-257 (1975), there has not be a single case under the National Labor Relations Act ("NLRA") holding that an outside union attorney may serve as a union representative for purposes of *Weingarten*. The absence of any case law permitting an outside attorney to serve as an union representative is especially notable considering the long line of cases – cited by the General Counsel in its Answering Brief – holding that the right to representation under

Weingarten includes the right to choose a specific union representative if that representative is available. *See* General Counsel's Answering Brief at p. 9 (*citing Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), *enfd.* 338 F.3d 267 (4th Cir. 2003), *cert. denied* 541 U.S. 973 (2004)). There is simply no basis under the NLRA for the ALJ's decision to significantly expand the *Weingarten* rights of unionized employees to interject an outside attorney into the regular workplace practice of conducting investigatory interviews of employee conduct.

Incredibly, in his Answering Brief, the General Counsel argues that, because John Poulos ("Poulos") was serving "a dual role as Union president and employee," "there was no one in the Union more capable than Poulos to provide representation." [Answering Brief at p. 10-11] The General Counsel provides absolutely no legal basis for its position that because Poulos was serving in his capacity as President of the Security Police Association of Nevada ("SPAN"), he has different or more "superior" representation rights under *Weingarten* than other union members. In fact, by making such an argument, the General Counsel is acknowledging that Poulos was seeking representation that was fundamentally different from the rights afforded to other rank-and-file union members. This argument should be rejected.

Moreover, there is also no support in the record for the General Counsel's argument that "Respondent's actions demonstrate why having counsel present made sense." [Answering Brief at 11] The General Counsel relies on Respondent's justifiable refusal to provide Poulos with a copy of the customer complaint against him *prior* to his interview to conclude that Union counsel was an appropriate choice to serve as a *Weingarten*

representative because there was "no higher official" than Poulos who could have received the "classified complaint." [*Id.*] While Respondent fails to understand the connection between these issues, it is important to note that there is no evidence in the record to establish that outside Union counsel Nathan Ring had any level of security clearance, which would have allowed him to review any classified information, let along the classified customer complaint at issue in this case. Rather than support the General Counsel's argument, these facts further demonstrate why the ALJ erred when she expanded *Weingarten* to permit an employee to request outside union counsel to serve as a union representative for an investigatory interview.

As explained in its Brief, the expansion of *Weingarten* to permit outside union counsel to participate in internal investigatory interviews *will* fundamentally alter this regular workplace practice. The General Counsel's attempt to downplay the significant burden that this unjustified expansion of *Weingarten* rights would place on the workplace should be rejected by the Board.

II. PAE Did Not Violate Section 8(a)(1) During the February 24, 2016 Investigatory Interview of Poulos.

Contrary to the General Counsel's argument, PAE did not issue a "blanket prohibition on legally protected participation in investigatory interviews." [Answering Brief at p. 17] Even the General Counsel acknowledges that Poulos' designated union representatives (Lujan and Campbell) were permitted to ask questions at various portions throughout the February 24, 2016 interview. The General Counsel simply cannot escape the well-established limits placed on *Weingarten* representatives that allow an employer

"to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." *Weingarten*, 420 U.S. at 258 (citation omitted).

Although the General Counsel vaguely references "5th Circuit case law," he does nothing to attempt to distinguish that decision. As noted in Respondent's Brief, the Fifth Circuit Court of Appeal's decision in *Southwestern Bell Tel. Co. v. NLRB* affirmed an employer's right to require an employee being interviewed to answer the questions himself *before* allowing the union representative to clarify facts or bring additional relevant facts to the employer's attention. 667 F.2d 470 (5th Cir. 1982). There is simply nothing in the record to establish that Poulos' two designated union representatives were precluded from effectively assisting Poulos during the investigatory interview. To the contrary, the evidence was undisputed that Poulos' union representatives had ample opportunity to assist at various portions of the February 24 investigatory interview and certainly after Poulos answered Rutledge's initial questions. The Board should grant PAE's Exceptions to the ALJ's conclusions and findings relating to the union representatives' participation in the February 24, 2016 interview.

III. The ALJ Improperly Analyzed the General Counsel's Allegation that PAE Unlawfully Interrogated Poulos on February 24, 2016.

Once again, with its Answering Brief, the General Counsel hopes that the Board will simply ignore critical case law that is very much on point with the facts in this case. While disregarding the Board's decision in *Fresenius USA Mfg., Inc.* 358 NLRB No. 138 (2012), the General Counsel argues that "the existence of a customer complaint does not give an employer license to ignore the protected nature of the union representative's

activity." [Answering Brief at p. 21] However, contrary to the General Counsel's argument, the Board in *Fresenius USA Mfg.* specifically noted that, "as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, *even if that conduct took place during the employees' exercise of Section 7 rights.*" *Id.* (emphasis added). Moreover, the Board noted that the questioning of the employee in *Fresenius USA Mfg.* occurred during the Fresenius' "*legitimate investigation* of employees' complaints about" the allegedly protected statements. *Id* (emphasis added).

Board case law makes it clear that, when an employer has a *legitimate basis* for investigating employee misconduct (in the instant case, a customer complaint regarding offensive conduct), it is not precluded from investigating the conduct simply because the employee conduct at issue may involve Section 7 activities. Significantly, there is no evidence in the record that Rutledge asked Poulos about any other union or protected activities during the February 24, 2016 investigatory interview, which led to Mr. Allen's complaint. *The focus of the interview was clearly the manner in which Poulos interacted with customer Raymond Allen.* Applying the factors set forth in *Rossmore House*, 269 NLRB 1176, 1177 (2003), the Board should reverse the ALJ's finding that PAE unlawfully interrogated Poulos during the February 24, 2016 investigatory interview.

IV. The ALJ Erred in Concluding that PAE Discriminated against Poulos When It Issued Him the March 24, 2016 Final Written Warning for Engaging in Conduct Not Protected under Section 7 of the NLRA.

As explained in detail in Respondent's Brief in support of its Exceptions, the ALJ erred in concluding that PAE violated Sections 8(a)(1) and (3) of the Act by issuing Poulos the March 24, 2016 final written warning. Specifically, the ALJ failed to properly apply the factors set forth in *Atlantic Steel*, 245 NLRB 814, 816-817 (1979) to determine that Poulos' February 16, 2016 conduct lost the protections of Section 7 of the NLRA. In his Answering Brief, the General Counsel fails to adequately address the ALJ's erroneous application of the *Atlantic Steel* factors. Yet again, the General Counsel wants the Board to ignore the significant evidence in the record demonstrating that PAE disciplined Poulos not for engaging in union activities, but instead for the *manner* of his interaction with its customer representative (Raymond Allen), which resulted in a customer complaint and the issuance of a Corrective Action Report from the Air Force. Significantly, the General Counsel still does not cite to a single case in which the employee's misconduct was directed towards a customer, as was the conduct at issue here.

Finally, the Board should reject the General Counsel's request to apply the Board's holdings in *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) or *Washington Fruit & Produce Co.*, 343 NLRB 1215 (2004) to the facts in this case. While conceding that the General Counsel's Complaint in this matter did not allege that Poulos was disciplined pursuant to an unlawful rule, the General Counsel nonetheless continues to pursue such a theory. [*See* Answering Brief at p. 33] Nonetheless, even if the Board were to look beyond this procedural deficiency, there is absolutely no evidence in the record to support the General Counsel's theory that PAE disciplined Poulos for violating an allegedly unlawful rule or that his discipline was "enhanced" because of his violation of an unlawful rule.

V. The ALJ Erred in Finding that PAE Maintained an Unlawful Rule When It Issued a March 24, 2016 to SPAN Officers.

As explained in Respondent's Brief, while recognizing that the March 24, 2016 rule does not explicitly restrict the Section 7 rights of PAE employees, the ALJ incorrectly concluded that PAE promulgated the March 24, 2016 rule in response to union activity because it was issued on the same day as PAE issued a final written warning to Poulos. In reaching this conclusion, the ALJ ignored a critical piece of evidence: that the memorandum containing the allegedly unlawful rule was issued because PAE's customer *requested* that Union officers refrain from contacting it on issues that can better be addressed by PAE. In response to Poulos' conduct, the U.S. Air Force issued a Corrective Action Request informing PAE that it had "a concern regarding interaction between Poulos and a Government customer, Ray Allen." [TR 208:5-209:4; 212:21 – 23; 209:5-14] The contracting officer that issued the CAR specifically asked PAE to take corrective action to address the appropriateness of Poulos' interaction with Allen.

Contrary to the General Counsel's argument, the Board should not disregard the *actual* reason for the rule, which is wholly unrelated to the employees' exercise of Section 7 rights. As explained in Respondent's Brief, to the extent the memorandum resulted in a minor interference on employees' Section 7 rights, it was necessary to preserve PAE's relationship with its customer, the U.S. Air Force.

VI. The ALJ Erred in Finding PAE Failed to Furnish Ray Allen's Classified Complaint in Violation of Sections 8(a)(1) and (a)(5).

For the reasons explained its Brief, the ALJ erred in concluding that PAE violated Sections 8(a)(1) and (a)(5) by failing to provide the Union with a *classified* version of Ray

Allen's complaint about his interaction with Poulos. As even the General Counsel recognizes, the ALJ's findings and conclusions were not consistent with the General Counsel's allegations in its Complaint. Nonetheless, even if they were, the undisputed evidence in the record demonstrates that PAE made considerable effort to accommodate the real and significant limitations placed on it by the U.S. Air Force's classification of the document.

CONCLUSION

For the reasons explained in PAE's Brief in support of its Exceptions, as well above, the Board should grant its Exceptions to the Administrative Law Judge Amita Baman Tracy's Decision and recommended Order, dated December 5, 2016.

DATED: February 10, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of PAE APPLIED TECHNOLOGIES, LLC'S REPLY IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE in Cases 28-CA-170331, et al., was served on February 10, 2017 as follows:

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